Supreme Court, U.S.
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In the

Supreme Court of the United States

No. 71-859

HENRY and ALMETA BRADFORD,

Petitioners,

v.

WALTON E. THOMPSON, et al,

Respondents.

RESPONSE TO PETITIONERS' APPLICATION FOR WRIT OF CERTIORARI

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To The Honorable Supreme Court Of The United States:

Now come W. B. POST, FIDELITY TITLE COMPANY and SECURITY TITLE & TRUST COMPANY, Respondents herein, and file this their response to Petitioners' Original Application for Writ of Certiorari and in support thereof respectfully show to the Honorable Supreme Court of the United States the following:

STATEMENT OF THE CASE

The facts and nature of the case are correctly set forth in the opinions of the courts below (Texas Supreme Court

and the Court of Civil Appeals for the 12th Supreme Judicial District of Texas), both of which are contained in *haec verba* in the Appendix to the Brief of Petitioners. A summary of the facts pertinent to the questions presented for review is as follows:

1. Henry Bradford and wife, Almeta Bradford, as purchasers, contracted for the purchase of property in Dallas, Texas, on October 13, 1964 for Eight Thousand Dollars ($8,000.00), payable One Thousand Two Hundred Dollars ($1,200.00) in cash and financing Six Thousand Eight Hundred Dollars ($6,800.00) in mortgage indebtedness.

2. By deed dated October 15, 1964, filed for record with the County Clerk of Dallas County, Texas, on November 2, 1964 the property was deeded to the Bradfords for the consideration there expressed including the assumption and agreement to pay Six Thousand Eight Hundred Dollars ($6,800.00) in mortgage indebtedness (represented by the unpaid principal balance of a vendor's lien note dated January 10, 1956, of Five Thousand Two Hundred Forty-Six Dollars and Sixty-six Cents ($5,246.66) and a second lien note in the amount of One Thousand Five Hundred Fifty-three Dollars and Thirty-four Cents ($1,553.34)) (Tr. p. 81).

3. The Bradfords then accepted the benefits of the deed and moved upon the premises on or about November 10, 1964.

4. Fidelity Title Company, agent, acting by W. B. Post, issued Security Title & Trust Company title policy to the Bradfords on November 2, 1964. Such policy failed to refer

to the second lien note in the amount of One Thousand Five Hundred Fifty-three Dollars and Thirty-four Cents ($1,553.34). Nevertheless, Mr. Bradford promptly commenced to make payments and thereafter made payments on both notes over a period of more than eighteen months, discharging one note in its entirety.

5. Subsequently, the Bradfords stopped making payments on the second lien note because of the dispute between the Bradfords and the holder of the note arising out of the holder's refusal to permit prepayment of the second lien note.

6. In the suit that ensued between Thompson, holder of the note, and the Bradfords, Petitioners herein, the Bradfords, also filed a counterclaim for damages for fraud and for other relief against these Respondents.

Respondents are particularly surprised at the statement on page 6 of Petitioners' Application that

> "The Bradfords had no actual knowledge that the second lien in question was containeed in their deed, as the Bradfords relied on their title policy to the exclusion of their deed in order to determine the status of their title."

for the reason that Mr. Bradford admittedly promptly began to make payments on both notes to two different companies and continued to make such payments until one note was discharged in its entirety and until the dispute arose involving the second note.

ARGUMENT AND AUTHORITIES

The sole question which Petitioners bring to this Court is whether or not the Court should take jurisdiction because of denial to Petitioners of due process of law, when, in reality, Petitioners' Application for Writ of Certiorari patently discloses that Petitioners are really seeking to set aside a State Court judgment (having been unsuccessful in the courts below) on the ground the Courts heretofore have erred in deciding against them. The record, as well as Petitioners' Application for Writ of Certiorari, itself, clearly reflects that (1) the difficulties and expenses of Petitioners resulted entirely from the conduct of Petitioners themselves as a consequence of the dispute with the holder of the second lien note over the question of the prepayment of that note and (2) that their grievances were thoroughly and fairly considered in three courts below. The mere fact that the Petitioners were unsuccessful in the Texas Court with respect to the application of the adjective law of that state to the case does not show that there has been a violation of the due process guarantee. This Court has previously stated on many occasions, as in the case of *Worcester County Trust Company v. Riley*, 302 U.S. 292, that "in any case the Constitution of the United States does not guarantee that the decisions of the State Courts shall be free from error * * * or require that pronouncements shall be consistent".

Respondents urge that the decision of the Supreme Court of Texas was absolutely correct, but even an erroneous decision by that Court on matters within its jurisdiction

does not deprive the unsuccessful party of his rights under the guarantee of due process where the parties have been fully heard in the regular course of judicial proceedings. In *Chicago Life Insurance Company v. Cherry*, 244 U.S. 25, Mr. Justice Holmes in delivering the opinion of the Court, stated:

> "Whenever a wrong judgment is entered against a defendant, his property is taken when it should not have been; but whatever the ground may be, if the mistake is not so gross as to be impossible in a rational administration of justice, it is no more than the imperfection of man, not a denial of constitutional rights. The decision of the Illinois courts, right or wrong, was not such a denial."

And to the same effect in a decision likewise considering the question of an appeal from an alleged erroneous decision on the part of the Supreme Court of the State of California was the opinion in *Neblett v. Carpenter*, 305 U.S. 297, to-wit:

> "All of these holdings concern matters of state law and amount at most to alleged erroneous constructions of the State's statutes by its own court of last resort. Such decisions would not be a denial of the due process guaranteed by the Fourteenth Amendment. We are, therefore, without jurisdiction to review the state court's decision of any of those questions."

Respondents respectfully urge that no grounds for jurisdiction is raised and no federal question is presented by the contentions of Petitioners that the judgments of the State Courts, under the circumstances, deprived Petitioners of due process of law in violation of the Fourteenth Amendment; it is not the function of the Supreme Court of the United States to serve as an additional appellate step to

review State Court decisions. In a memorandum decision denying Application for Writ of Certiorari on a question similar to that presented here this court again affirmed the proposition that Federal Courts are not authorized to act in substantially appellate capacity to review State Court decisions. *Resolute Insurance Company v. North Carolina*, 393 U.S. 978.

The Petitioners charge that both of the Appellate Courts below completely overlooked the matter of the necessity of Respondents' specifying the exceptions under the Respondents' title insurance policy taking away the coverage of the insurance contract. Such was not the case. The Court of Civil Appeals held that, as a matter of law, the Petitioners by their own pleadings demonstrated that no liability existed under the policy; the Supreme Court of Texas affirmed the judgment of the Court of Civil Appeals in all respects except as to the point involving title and possession.

Assuming arguendo that the Supreme Court of the United States has jurisdiction of the State Court judgments for the purpose of additional appellate review, Respondents again urge that the application of Rule 94 by the courts below to the facts there presented was wholly correct.

The jurisprudence of the State of Texas supports the proposition that the purpose of Rule 94 is to require that in the event an insured suffers from a loss covered by an insurance contract but which said general coverage is limited and avoidable by virtue of certain special exceptions or exclusions, then the insurer must plead those exceptions or exclusions pursuant to the requirement of Rule 94; however,

there is first a cardinal requirement that the insured must allege and prove facts showing that the loss was one covered by the general hazards insuring clause, that it is actually part of the general hazard itself, contrary to the situation here in which the insurance policy general insuring clause does not and did not extend to the fact situation as pled by Petitioners, Mr. and Mrs. Bradford (Tr., p, 24).

The title policy initially states in its insuring provisions that Security Title & Trust Company guarantees to Henry Bradford and wife that they have good and indefeasible title to the property described. The policy then states that the Company "shall not be liable in a greater amount than actual monetary loss of assured". The Petitioners have suffered no loss; they contracted to assume $6,800.00 in mortgage indebtedness; they assumed $6,800.00 in mortgage indebtedness; they arbitrarily stopped payment on one of the notes comprising the $6,800.00 of indebtedness, and thereafter proceedings were instituted against them. The Petitioners suffered no loss as a result of any "defect of title", but any troubles, expenses or losses they have suffered have been occasioned by the intentional and overt conduct on the part of the Petitioners, themselves. Also provided in the terms of the policy on the insuring clause is the statement that "nothing contained in this policy shall be construed as insuring against loss or damage by reason of any claims arising under any obligation of the assured; or under any act, thing, or trust relationship, done, created, suffered or permitted by the assured". By virtue of the terms of the deed to the Petitioners, Petitioners assumed the payment of the second lien note; and by their own acts they

created the relationship established. Therefore, the title policy did not extend to any loss or damage resulting to Petitioners by virtue of the existence of the second lien note, and the lien created by virtue thereof. Elsewhere, the terms of the policy set out the specific exceptions and exclusions to which the policy was subject and not here involved. The voluntary assumption of the indebtedness is not such an exception or an exclusion but actually part of the general hazard insured against. The matter of the voluntary acts of the assured under the policy of insurance was a part of the insurer's *basic promise* (emphasis added); it is not the purpose of Rule 94 of the Texas Rules of Civil Procedure to require an insurer to allege that the voluntary acts were not covered by the basic promise. In this case, the voluntary acts clause does not limit the general liability for the loss covered by the general hazards; this is actually part of the general hazard itself; it is the very basis of the contract, containing provisions which constitute the integral parts of the Respondents' promise to the Petitioners. It is an element of the statement of the Respondents' basic promise to the Petitioners, as distinguished from exclusions subsequently made from a broader promise.

The question is one of construction as indicated in *Dorsky v. New York Life Insurance Company*, 315 Mass. 17, 51 N. E. 2d 761 and *Anthony v. The Mercantile Mutual Accident Corporation*, 38 N. E. 973, 26 L.R.A. 406. In *Merryman v. Employers National Life Insurance Company*, 416 S.W. 2d 609 (Tex. Civ. App., 1967, writ ref., n.r.e.) virtually the identical question was presented to the Beaumont court. The insured suffered a broken leg and subsequently had to

have the limb amputated; the insurance policy provided for coverage of the loss if the loss of Appellant's leg was occasioned as a result of accidental means solely and independently of all other causes. The insurance company denied that the loss for which the insured sought recovery was covered by the policy and did not specially plead the provisions limiting the coverage. The Appellant contended that the insurance company waived its defense by not specially pleading the provisions of the policy pursuant to Rule 94, Texas Rules of Civil Procedure. In the consideration of the case, the court held at p. 610, as follows:

> "We have concluded that the insuring clause itself is the key to the solution of this case. The general hazard insured against was not the loss of a foot, but the loss of a foot effected solely and independently of all other causes through external, violent and accidental means. The burden of proof was upon the plaintiff to allege and prove facts showing that the loss of his leg was covered by the policy, and this he failed to do."

The same conclusion was reached in *Alamo Casualty Co. v. Richardson*, 235 S.W. 2d 726 (Tex. Civ. App., 1951, writ ref., n.r.e.) where the court distinguishes where a clause is the very basis of the contract constituting integral parts of the promise to pay. The Court states that the declarations are "as we construe them, elements of the statement of defendant's basic promise to plaintiff, as distinguished from exclusions subsequently made from a broader promise". In the case of *Evans v. Pacific National Fire Insurance Company*, 367 S.W. 2d 85 (Tex. Civ. App., 1963, writ ref., n.r.e.),

the Court stated, citing *Preferred Life Insurance Co. v. Stephenville Hospital et al*, 256 S.W. 2d 1006, 1010 (Tex. Civ. App,, 1953, no writ hist.), that the insured persons had the burden of establishing their right to recover. The Court held that a clause was " 'not an exception to the "general liability" provided by "other provisions limiting such general liability" but is inherent in the provisions of the policy which define the maximum liability in the first instance. The limitation was, therefore, a part of and inseparable from the "general liability" as referred to in Rule 94 * * *' ".

SUMMARY OF ARGUMENTS

I.

The Supreme Court of the United States should not entertain a petition for writ of certiorari based on denial of due process under the Fourteenth Amendment where the basis for Petitioners' Application is simply disagreement with the decisions of the courts below rather than denial of opportunity to be fully and thoroughly heard on all matters of fact and questions of law.

II.

The 12th Court of Civil Appeals of Texas and the Supreme Court of Texas considered and properly applied Rule 94 of the Texas Rules of Civil Procedure.

CONCLUSION

Wherefore, premises considered, Respondents pray that for the reasons stated the Application for Writ of Certiorari be in all things denied.

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By _____

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CERTIFICATE OF SERVICE

I, EDWARD J. DRAKE, attorney of record for Respondents W. B. Post, Fidelity Title Company and Security Title & Trust Company, in the above cause, do hereby certify that I have on this 27th day of January, 1972 forwarded a copy of the above and foregoing Response to Petitioners' Application for Writ of Certiorari to all of the following attorneys, being the attorneys for Petitioners and attorneys for Respondents, at the addresses indicated:

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